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In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1296

WILLIAM A. WAREHIME, d.b.a.
NEZEN MILK FOOD COMPANY, *et al.*,
Petitioners,

vs.

H. H. VARNEY, MILK MARKET AGENT,
WAR FOOD ADMINISTRATION, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To The United States Circuit Court of Appeals
For the Sixth Circuit
and
BRIEF IN SUPPORT OF PETITION.

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To The United States Circuit Court of Appeals for the Sixth Circuit.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, William A. Warehime, d.b.a. Nezen Milk Food Company, *et al.*, respectfully petition this Honorable Court to issue a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above entitled cause on the 8th day of February, 1945.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals (R. 118) is officially reported in 147 F. (2d) 238. The orders of that court denying Rehearing (R. 130) and denying Motion to Stay Mandate (R. 131) are not yet officially reported.

The opinion of April 3, 1944 of the District Court of the United States for the Northern District of Ohio, East-

ern Division is officially reported in 54 F. Supp. 907 (R. 105).

The Findings of Fact and Conclusions of Law of the District Court (R. 105) are not officially reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on the 8th day of February, 1945 (R. 117). Petition for Rehearing was filed on the 26th day of February, 1945 and was denied on the 19th day of March, 1945 (R. 130).

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended.

The Supreme Court of the United States, on April 24, 1945, entered an Order staying the mandate of the United States Circuit Court of Appeals for the Sixth Circuit to and including May 21, 1945, providing a petition for writ of certiorari is filed on or before that date, and provided further that a good and sufficient surety bond in the amount of Five Hundred Dollars ($500.00) is posted on or before that date and that this stay shall continue pending final disposition of the case should the petition for certiorari be filed on or before that date.

QUESTIONS PRESENTED.

I. Whether the Second War Powers Act delegates to the War Food Administrator authority to require of petitioner handlers of milk the payment of an assessment fixed by the Director of Food Distribution "to meet the expenses which the Director finds will be necessarily incurred by the operations of this (FDO 79) order."

II. Whether the power to exact the assessment provided for in FDO 79, if implied in the Second War Powers Act, would result in an invalid and unconstitutional delegation of legislative authority.

STATUTES AND REGULATIONS INVOLVED.

The statute involved in this proceeding is Title III of the Second War Powers Act, 1942 (March 27, 1942, Public Law 507, ch. 199, 77th Congress, 2d session, 56 Stat. 177 (50 U. S. C. Sec. 633) which amended subsection (a) of section 2 of the Act of June 28, 1940 (54 Stat. 676) as previously amended by the Act of May 31, 1941 (55 Stat. 236)). The applicable provisions of the Act are as follows:

> "* * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

The Act specifies that the President may exercise the powers conferred through such department, agency or officer as he may direct, provides that "any person who wilfully fails to perform any act required by any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor" punishable by fine of not more than $10,000 or imprisonment of not more than 1 year, or both, and vests the district court with jurisdiction of violations, and of civil action to enjoin violations of the act or any rule, regulation, or order thereunder.

By a series of Executive Orders the President on April 19, 1943 authorized the War Food Administrator to exercise the power under this act, insofar as it relates to priorities and allocations of food. The same orders authorized delegation of any part of the power to employees of the Department of Agriculture in his discretion.

In exercise of the power thus vested in him Marvin Jones, as War Food Administrator, issued Food Distri-

bution Order 79 (8 FR 12426) (R. 7-10) on September 7, 1943. FDO 79 established a system of regulation for handlers of milk. It authorized the Director of Food Distribution to designate milk sales areas, and within such areas to establish quotas for the sale by handlers of milk, cream and milk by-products, base periods for the establishment of quotas, and quota periods. It further authorized the Director to designate market agents for sales areas. The order provides:

"The market agent is authorized and directed to:

(i) Obtain and assemble reports from handlers; assemble data with respect to the production, shipments, sales and delivery of milk, milk byproducts, and cream in the area and with respect to the handlers under his jurisdiction; and furnish to the Director such available information as may be requested;

(ii) Receive petitions for relief from hardship; compile all necessary facts and data concerning such petitions; and transmit such petitions to the Director together with his recommendations;

(iii) With the advice of the advisory committee, prepare schedules establishing for various purchasers or classes of purchasers priorities to the purchase of milk, milk byproducts, and cream from handlers and transmit such schedules for approval to the Director, and such approved schedules shall be made available to handlers as schedules to be followed by them in the disposition of milk, milk byproducts, and cream;

(iv) Upon the request and with the advice of the advisory committee, devise plans which will permit handlers to share equitably in available supplies of milk and administer such plans upon approval by the Director;

(v) Keep books and records which will clearly reflect all of his acts and transactions, such books and records to be subject at any time to examination by the Director;

(vi) Collect the assessments as provided in this order from handlers required to pay such assessments;

(vii) Deliver to the Director promptly after the designation a bond in an amount and with surety thereon satisfactory to the Director, conditioned upon the faithful performance of the market agent's duties under this order;

(viii) Employ and fix the compensation of such persons as may be necessary to enable him to perform his duties hereunder;

(ix) Obtain a bond with reasonable surety thereon covering each employee of his office who handles funds under this order;

(x) Investigate and report to the Director any violation of this order;

(xi) Submit to the Director for approval a budget of expenses hereunder of the market agent;

(xii) Pay out of the funds collected by him as market agent the cost of his bond and of the bonds of his employees, his own compensation and that of his employees, and all other expenses necessarily incurred by him in the performance of his duties hereunder;

(xiii) Audit or inspect the books, records and other writings, premises, or inventories of milk, byproducts, and cream of any handler operating within the milk sales area subject to the jurisdiction of the market agent; and

(xiv) Perform such other duties as the Director may from time to time specify."

The order further provides in Section (c) (4):

"Each handler shall pay the market agent, within 20 days after the close of each calendar month, after the date of appointment of the market agent, an assessment upon the milk, milk byproducts, and cream, or any such portion thereof as may be specified by the Director, delivered by such handler during each such calendar month. This assessment shall be fixed, and may be modified from time to time, by the Director to meet the expenses which the Director finds will be necessarily incurred by the operations of this order in connection with an order issued pursuant hereto by

the Director: Provided, however, that the assessment shall not exceed $0.03 per hundredweight of milk, milk equivalent of cream, and skim milk equivalent of milk byproducts."

The order contains the following provision as to sanctions for violations:

> "*Violations.* The War Food Administrator may suspend, revoke, or reduce the quota of any person who violates any provision of this order, may prohibit by order such person from receiving or using milk, cream, or any other material subject to priority or allocation control by the War Food Administrator, and may recommend that any such person be prohibited from receiving, making any deliveries of, or using materials subject to the priority or allocation control of other governmental agencies. In addition, any person who wilfully violates any provision of this order is guilty of a crime and may be prosecuted under any and all applicable laws. Further, civil action may be instituted to enforce any liability or duty created by, or to enjoin any violation of, any provision of this order."

Food Distribution Order No. 79-3 (8 FR 13367) was issued by the Director of Food Distribution effective October 4, 1943, and established what is known as the Cleveland, Ohio milk sales area. For that area it sets quotas for the amount of milk, cream, and milk by-products which handlers are permitted to sell to the civilian market. Milk, cream, and milk by-products delivered to the armed forces and certain other specified agencies are free from quota restrictions. An assessment of one cent a hundredweight on quota milk only delivered by handlers is provided for, to be paid to the market agent and to be used to pay the expenses of administration under the order. The market agent is required to report violations of the order to the Director of Food Distribution.

SUMMARY STATEMENT OF MATTER INVOLVED.

Under Title III of the War Powers Act, 1942, 56 Stat. 178, Title 50 U. S. C., Sec. 633, whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material for defense or of any facilities for defense or for private account or for export, he is authorized to allocate such material or facilities in such manner and upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense and the President is empowered to effectuate the policies of the act through such department, agency or officer of the government as he might direct and in accordance with rules and regulations he might prescribe. The act carries a penalty for its violation or the violation of any regulation or order thereunder of a fine of not more than $10,000.00 or imprisonment for not more than one year or both.

On December 5, 1942, the President issued Executive Order 9280 (7 F. R. 10179), in which he, in substance, stated that, acting under the Constitution and Statutes of the United States and as Commander-in-Chief of the Army and Navy and in order to assure an adequate supply and an efficient distribution of food to meet war and essential civilian needs, the Secretary of Agriculture was authorized and directed to assume full responsibility for and control over the nation's food program.

In order to carry out this order, the Secretary was delegated the powers of the President as Commander-in-Chief of the Army and Navy and the powers conferred upon the President by Title III of the Second War Powers Act insofar as such powers related to priorities and allocation of food for human or animal consumption or for use in connection with the food program. By Executive Order No. 9322, March 26, 1943 (8 F. R. 3807), as amended by Executive Order No. 9334, April 19, 1943 (8 F. R. 5423), the

powers of the Secretary of Agriculture as delegated in Executive Order 9280 (7 F. R. 10179), issued December 4, 1942, were re-delegated to the War Food Administrator which office was established by the Executive Order, and in this order, the War Food Administrator was authorized to exercise all the powers of the President insofar as such powers related to production, priorities and allocation of food. The Food Administrator was also authorized in his discretion to redelegate any part of the powers conferred on him to any employee or officer of the Department of Agriculture.

The War Food Administrator, on September 7, 1943, issued Food Distribution Order 79 (8 F. R. 12426), establishing a system of regulation for handlers of milk and creating the office of Director of Food Distribution, naming himself such Director. The latter officer was empowered to designate milk sales areas and to establish in such areas quotas of milk for sale by handlers of milk, cream and milk byproducts and the Director was also authorized to establish quota and base periods. The manner in which these things were to be done was specifically provided in the order. The Director was also authorized to appoint Market Agents for each sales area. Each Market Agent was authorized and directed to obtain and assemble specified reports which were required to be made under the terms of the order by each milk handler in the area and also to receive petitions for relief from hardship, and with the advice of an advisory committee, which was created under the order, the market agent was authorized to prepare schedules establishing for various purchasers or classes of purchasers, priorities for the purchase of milk, milk byproducts and cream from handlers and after the Director had approved the schedules they were to be made available to handlers and to be followed by them in the disposition of the products covered in the order. Upon the request and with the advice of the Advisory Committee, the market

agent was to promulgate regulations upon the approval of the Director, providing for the handlers to share equitably in the available supplies of milk and its by-products in the given area. The order specifically provided that:

> (4) Each handler shall pay the market agent, within 20 days after the close of each calendar month, after the date of appointment of the market agent, an assessment upon the milk, milk by-products, and cream, or any such portion thereof as may be specified by the Director, delivered by such handler during each such calendar month. This assessment shall be fixed, and may be modified from time to time, by the Director to meet the expenses which the Director finds will be necessarily incurred by the operations of this order in connection with an order issued pursuant hereto by the Director: Provided, however, that the assessment shall not exceed $0.03 per hundredweight of milk, milk equivalent of cream and skim milk equivalent of milk byproducts.

The market agent was authorized to employ and fix the compensation of such persons as were necessary to perform the duties outlined in the order and was authorized to collect the assessments provided in the order and out of the fund so collected, his salary and expenses and those of his assistants were to be paid.

The order provided that the Director should be entitled to make such audits or inspections of the books and records as in his discretion he deemed essential to the enforcement or administration of the provisions of the order and he was also authorized to obtain such information from and require such reports and the keeping of such records by any person as he might deem necessary or appropriate to the enforcement or administration of the order, all of these things to be done, subject to the approval of the Bureau of the Budget pursuant to the Federal Reports Act of 1942. For a violation of any part or provision of the order, the War Food Administrator was authorized to:

"* * * suspend, revoke or reduce the quota of any person who violates any provision of this order, may prohibit by order such person from receiving, or using milk, cream, or any other material subject to priority or allocation control by the War Food Administrator, may recommend that any such person be prohibited from receiving, making any deliveries of, or using materials subject to the priority or allocation control of other governmental agencies. In addition, any person who wilfully violates any provision of this order is guilty of a crime and may be prosecuted under any and all applicable laws. Further, civil action may be instituted to enforce liability or duty created by or to enjoin any violation of, any provision of this order."

The administration of the order and the powers vested in the War Food Administrator insofar as such powers related to the administration of the order were delegated to the Director who in turn was authorized to re-delegate any of his power to any employee of the United States Department of Agriculture. The provisions of the order applied throughout the United States and the District of Columbia.

Food Distribution Order No. 79-3 (8 F. R. 13367) was issued by the Director of Food Distribution effective October 4, 1943. This order put into effect Order 79 establishing the Cleveland, Ohio Milk Sales Area. The order provided for an assessment of one cent a hundredweight on quota milk delivered by handlers, the sum thus collected to be used to pay the expenses of administration of the order. The market agent was required to report all violations to the Director of Food Distribution, War Food Administration, Washington, D. C.

Suit was brought by petitioners in the District Court on January 10, 1944 to enjoin the enforcement of the assessment provisions of FDO 79 after a deadline of January 5, 1944 had been set by the market agent for payment of the assessments. Each of the petitioners is or was at the

time suit was brought in the District Court, engaged in the business of distributing milk and milk byproducts, wholesale and retail, in the Cleveland, Ohio area and their businesses are, or were, within the ambit of Food Distribution Orders Nos. 79 and 79-3, insofar as such orders may be valid. Defendants to the action in the trial court were H. H. Varney, Milk Marketing Agent, War Food Administration, Cleveland Sales Area, Fred W. Issler, Market Agent, War Food Administration, State of Ohio Sales Area, and Marvin Jones, War Food Administrator, Washington, D. C.

Respondents are threatening to institute criminal proceedings against each of the petitioners because of their failure to make reports and pay the assessments provided in the orders, and respondents are threatening to confiscate the business of each of the petitioners by preventing each of them from obtaining tires, gasoline and priorities necessary to the operation of their respective businesses and each of the petitioners is without adequate legal remedy at law and each of them will suffer irreparable loss and injury unless respondents are enjoined from proceeding against each of them.

Petitioners contend that the assessment provision of War Food Administration Order No. 79 is invalid because it provides for an assessment collectible from milk handlers, the proceeds of which are to be used for the payment of salaries and expenses of the officers and agents of the United States engaged in the enforcement of the order and that there is no statutory authority for the promulgation of regulations by the War Food Administration imposing the cost of the administration of the order on handlers of milk.

Respondents specially appeared in the District Court and moved that service of summons be quashed and that the complaint and motion for preliminary injunction be dis-

missed on account of improper joinder of parties defendant, improper venue and lack of jurisdiction.

Respondents, H. H. Varney, Milk Marketing Agent, War Food Administration, Cleveland Sales Area, and Fred W. Issler, Market Agent, War Food Administration, State of Ohio Sales Area, claimed that each of them was improperly made a party defendant. Defendant, Marvin Jones, War Food Administrator, Washington, D. C., claimed he was improperly served and that the court had acquired no jurisdiction over his person because of service of process on him in Washington, D. C., and further that he was an inhabitant of the District of Columbia and that the court had no jurisdiction of the cause as against him. The trial court sustained the motion of Jones to quash and dismissed the proceedings as to him and overruled the motions of Varney and Issler. After joinder of issue, the court heard proof and on final submission, after findings of fact and conclusions of law, decreed that respondents herein, their agents and anyone acting on their behalf, be enjoined permanently from enforcing the assessment provisions of food distribution orders Nos. 79 and 79-3 against the petitioners or any one of them and from collecting such assessments.

On July 13, 1944 respondents herein filed their notice of appeal to the Circuit Court of Appeals for the Sixth Circuit. The Circuit Court of Appeals, on February 8, 1945, reversed the judgment of the District Court and remanded with directions to dismiss the petition. (R. 117) The Circuit Court found specifically that it had jurisdiction of the cause, that the War Food Administrator is not an indispensable party and that there was a showing by petitioners of such immediate threat of irreparable injury to them as to require that court to afford protection through equitable intervention. The Circuit Court found further that the assessment in question is not a tax and therefore not an unconstitutional delegation of legislative authority

to an administrative agency. On February 26, 1945, petitioners in the Circuit Court of Appeals filed a Petition for a Rehearing. This petition was denied by the Circuit Court on March 19, 1945. (R. 130) Petitioners then made a motion in the Circuit Court for a stay of its mandate pending application to the Supreme Court of the United States for a writ of certiorari. This motion was denied by the Circuit Court on April 3, 1945. (R. 131.)

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals Erred:

1. In holding that the Second War Powers Act delegates to the War Food Administrator authority to promulgate regulations (FDO 79 and 79-3) requiring petitioner handlers of milk, cream and milk byproducts to pay an assessment fixed by the Director of Food Distribution to meet the expenses which the Director finds will be necessarily incurred by the operations of this (FDO 79) order.

2. In holding that the promulgation of Food Distribution Order 79 insofar as the assessment features are concerned in levying an assessment on the handlers of milk is not the exercise of legislative discretion vested by the Constitution in the Congress.

3. In holding that the assessment provisions of FDO 79 and 79-3 were an incident proper to the regulation of the milk industry in time of war.

4. In holding that the assessment levied by FDO 79 on handlers of milk, cream and milk by-products is neither the levying of a tax nor a revenue measure.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. Because the Circuit Court of Appeals for the Sixth Circuit has decided an important question of federal law which has not been but should be settled by this Court.

The question in issue involves the construction of the Second War Powers Act and the constitutional power of Congress to delegate its legislative functions.

2. Because there is involved in this case a grave and important question in which there is a very great public interest in obtaining a decision from the Supreme Court of the United States. The question raised by this case is of a very grave character since it presents a problem fundamental in administrative law, that of the power of administrative agencies to finance their own operations. In view of the trend in recent years toward an ever enlarging field of activity of administrative agencies, the actions of some administrative agency or other now affect almost every individual in the United States. Therefore, there is an extremely keen public concern with respect to the extent of the powers of these agencies. Whether the assessment powers claimed by respondents herein are to be implied, or, can in fact even be expressly delegated by Congress to an administrative agency, is of vital importance to all of us and it is clear that there is a great public interest in obtaining a decision on the matter from this Court of last resort.

3. Because petitioners, as correctly found by both courts below, are threatened with immediate, serious and irreparable injury for which they have no adequate remedy except as sought in this case. The sole issue is the constitutionality of the assessment provision contested. Only this Court can determine such issue.

CONCLUSION.

Wherefore, petitioners respectfully pray that the writ of certiorari be issued by this Honorable Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding that Court to certify and to send to this Court for its review and determination a full and complete transcript of the record and proceeding in the case entitled on

its docket, "H. H. Varney, Milk Market Agent, War Food Administration, et al., Appellants, vs. William A. Warehime, d.b.a. Nezen Milk Food Company et al., Appellees," and that this Court review and decide the said questions presented and reverse the judgment of the Circuit Court of Appeals for the Sixth Circuit entered in said cause, and that petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated, at Cleveland, Ohio, May 11, 1945.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Report of Opinion Below.

The opinion of the Circuit Court of Appeals is officially reported in 147 F. (2d) 238.

Jurisdictional Statement.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Court, as amended by the Act of February 13, 1925.

Statement of the Case.

The pertinent facts are stated in the foregoing petition (pages 7-13).

Specification of Errors.

The specification of Errors is set forth in the foregoing petition at page 13.

ARGUMENT.

I. THE SECOND WAR POWERS ACT DOES NOT DELEGATE TO THE WAR FOOD ADMINISTRATOR AUTHORITY TO REQUIRE PAYMENT OF THE ASSESSMENT THREATENED TO BE IMPOSED AGAINST PETITIONERS, AND FOOD DISTRIBUTION ORDERS 79 AND 79-3 ARE TO THAT EXTENT INVALID AND UNCONSTITUTIONAL.

A. The Act does not contain any express delegation of power to exact an assessment.

Defendants do not claim any such express authority, and rely entirely on the language in the Act "* * * in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate * * *." Title III, Second War Powers Act, 1942, Sec. 2(a)(21).

B. The Act does not impliedly or inferentially delegate authority to enact an assessment "to meet the expenses which the Director finds will be necessarily incurred by the operations of this order."

1. Congressional care in providing for detailed incidental powers negatives an intent to delegate by complete silence such a far-reaching, unrelated and non-incidental power as that of self-financing.

An examination of the Second War Powers Act, Title III, indisputably discloses that Congress made no express delegation of power to promulgate an assessment-levying regulation. It is to be assumed that such a far-reaching power would have been mentioned and expressly provided for had it been intended. It is observed that Congress expressly provided for a great enumeration of incidental and enforcement-aiding powers (Sections 2(a), (3) and (4)) which might well have been implied and inferred as properly incident to the general power of allocating scarce materials, yet Congress provided for them in detail. Congress took care (Section 2(a) (8)) to authorize redelegation of

authority by the President. Congress (Sections 2 through 14, inclusive) provided a great mass of detail for guidance and limitation in administering the powers conferred, such as powers of subpoena, requiring the keeping of records, making reports, etc. set forth in subsection 2(a), (3) and (4) of the Act and even specifying hours and wages. That Congress was not unmindful of even incidental financial considerations is further evidenced by requiring a profit limitation on war contracts (Section 2(b)). It is not conceivable that Congress intended to grant any such basic, non-incidental power as that of levying a self-supporting assessment by complete silence when it provided in such extensive and minute detail for other far less important and less far-reaching incidental powers. To imply any such grant of power from the Second War Powers Act is to disregard the nature and form of the Act, and the apparent care with which Congress acted in expressing its intent in matters of detail and incidental powers. Such implication of grant of power further disregards the legislative history of such power delegation apparent in the very absence of its use by Congress. It is not to be inferred that Congress here intended by silence to grant a power so seldom granted before, and then only by express provision with one or two possible exceptions where a power of regulatory (not mere self-financing) assessment was found implied. Diligent search by counsel fails to find a single precedent where an administrative agency even assumed it had or exercised any such implied power of pure self-financing divorced from regulatory mode or licensing. Counsel for respondents have suggested no such precedent. We deem this lack of precedent highly persuasive if not determinative of the lack of such power by implication. Certainly it is clear that, giving due weight to these considerations, it is a misconstruction of the intent of Congress to enlarge by inference and implication the provisions of the Second War Powers Act to include the delegation of authority to levy

and collect an assessment to meet the expenses of administration. This is adequately demonstrated by Congress itself. Upon learning of the attempt of the War Food Administrator to levy and collect the assessment objected to, Congress immediately, in effect, prohibited such assessment (Public Law 367, 78th Cong., Ch. 296, 2d session). (FDO 79 was amended June 21, 1944, eliminating the assessment provisions here contested (9 F. R. 6982)). We conceive of no possible basis for implying the delegation of such assessment power except the complete failure to provide for administration from public funds and thus rendering a delegation of administrative enforcement of legislative policy a nullity in the absence of the power of self-financing. That no such situation exists here is attested by the fact that FDO 79 has been in operative effect and enforced by use of public funds since June 21, 1944, without an assessment provision in the Order. We conclude that there was no need for such power and that Congress intended no such power. We submit that finding such power in the Second War Powers Act is erroneous and contrary to its provisions and congressional intent.

Furthermore, that portion of the Second War Powers Act (Section 2(a)(21)) particularly relied upon by respondents provides the nature and subject matter of permitted regulation. The imposing of an assessment to cover expenses of operation is not included in its provisions and must thus be deemed excluded by congressional intendment. Such congressional expression of intent ought not to be nullified by implying or inferring the existence of the disputed power. The Act provides that:

> "* * * the President may *allocate such material or facilities in such manner, upon such conditions and to such extent* as he shall deem necessary or appropriate in the public interest and to promote the national defense." (Emphasis supplied.)

It is not disputed that the subject matter of permissible regulation is allocation, or rationing of essential materials and facilities, including milk and its handling. Such regulation may establish the *manner* of allocation. It cannot be claimed that the imposition of the contested assessment is a manner, method or mode of regulation. Its stated purpose is otherwise as hereinbefore pointed out. Or such regulation may establish the *conditions* upon which allocation will be made. Obviously the assessment sought to be imposed is not such a condition. Handling milk is not made conditional or contingent upon payment of a license fee. *Conditions* must be taken to mean those matters affecting discretion as to the distribution of rationed materials, such as normal or extraordinary need or qualification for receiving such scarce materials. Or such regulation may prescribe the *extent* of allocation. Milk handlers' quotas are clearly not fixed by the assessment. Rather the assessment is dependent upon the milk actually handled. Neither do we find any apparent connection between the assessment and the public interest or national defense.

2. *The Second War Powers Act is entirely dissimilar to milk industry Codes and similar assessment powers may not be implied.*

The Circuit Court of Appeals in its opinion (R. 128) points out that the milk industry has long been the subject of legislation and many state codes applicable to it have been adopted, citing *Nebbia v. People of New York*, 391 U. S. 502, which reviews much of such legislation. We respectfully point out, however, that such fact has no bearing upon and is not a precedent in the question at issue. In the first place, such codes are direct and not delegated legislative enactments. The fees and assessments therein imposed are specifically established by the legislature in amount, or the standards and limitations of the amount to

be determined and assessed by the administrative agency as well as the authority to make such determination and assessment are specifically prescribed by the legislature. It is clear that the Second War Powers Act contains no similar provision. In the second place, such legislation is a police power regulation of an industry deemed necessary for health and public welfare. It is milk regulatory legislation. The Second War Powers Act is not claimed to be such type of legislation. It is clearly a war emergency measure and is a war power enactment in the interest of promoting national defense on the home and battle fronts. It is not an industry police power regulation but a war material supply and allocation enactment. There is no basic governmental authority relationship between the two types of legislation. Furthermore, milk industry police power regulation is a right of the State governments. On such basis the Federal Government is without regulatory authority and apart from the power to regulate interstate commerce, the war power or similar Constitutional authority, is without power to so regulate the milk or other industry. See *United States v. Butler*, 297 U. S. 1 and *Rickert Rice Mills v. Fontenot*, 297 U. S. 110. Such was not deviated from in the later decision in *United States v. Rock Royal Corp.*, 307 U. S. 533, *Hood & Sons v. United States*, 307 U. S. 588, and *Wrightwood Dairy Co. v. United States*, 315 U. S. 110. We may thus conclude that milk industry police power regulation does not afford any basis or precedent in the issue before us, and does not serve as any authority for interpretative enlargement of the provisions of the Second War Powers Act. The two types of legislation are totally different both as to authority basis and purpose. The normal incidents of one are not to be imputed to the other.

3. The Agricultural Marketing Agreement Act of 1937 serves as no precedent in the implication of powers intended in the Second War Powers Act.

In the lower courts, counsel for respondents placed great reliance upon three decisions of the United States Supreme Court, namely, *United States v. Rock Royal Corp.*, 307 U. S. 533 (1939), *Hood & Sons v. United States*, 307 U. S. 588 (1939), and *United States v. Wrightwood Dairy Co.*, 315 U. S. 110 (1942). These decisions by a divided court sustained the Agricultural Marketing Agreement Act of 1937 as a proper exercise by Congress of the power to regulate the price of milk insofar as it affected *interstate commerce*. The issues there involved are not pertinent to this case and we need not inquire into the validity of that legislation. There the authority to control prices through the medium of pool payment assessments, and then only after obtaining a majority consent by referendum of those sought to be charged, was specifically enacted, and the manner and procedure largely determined by Congress itself. Administrative detail only was delegated to the administrative agency in the opinion of the Court.

Here we are confronted with an attempt by an administrative agency to usurp unto itself the taxing power without a shred of delegated authority. There is no analogy whatsoever between the cases cited and the instant case.

4. The assessment objected to cannot be sustained as an implied license charge.

The instant case is to be distinguished from those involving legislation of a licensing nature, wherein one is permitted to engage in an undertaking, presumably for personal profit, subject to government sanction, control and regulation, where from the subject matter, the existing conditions and circumstances or the privilege conferred,

it may be reasonably and normally anticipated or inferred that some cost covering fee or assessment will be enacted. See *Hamilton v. Dillon*, 88 U. S. 73 and *Morgan v. Louisiana*, 118 U. S. 455. It is to be noted that petitioners are engaged in a long established industry. Continued operation is essential in times of war and peace. No special favor or dispensation is offered for which compensation by license fee or assessment would be in normal expectation or implication. It is to the interest of the government and the public as well as to petitioners to encourage and promote their operation rather than to discourage or impede it by exacting a license or privilege charge. It seems clear that Congress in the Second War Powers Act expressed such view by carefully not providing for any licensing system as distinguished from its including such power in another war emergency enactment—the Emergency Price Control Act. Such differentiation in treatment and purpose, as well as the fact that the licensing power has been seldom and sparingly used by Congress, was carefully noted by the Supreme Court but recently (May 22, 1944) in *Stewart & Bros. v. Bowles*, 322 U. S. 398. Upon this basis of consideration it must be concluded that all normal and reasonable implications strongly negative rather than support the assessment under scrutiny.

5. The assessment in issue is not a mode of regulation.

It is equally clear that the subject assessment is necessarily distinguished from those types of regulation where the enactment of a fee or charge is an ordinary, normal and anticipated method, means or mode of regulation. See the *Head Money Cases* (*Edge v. Robertson*), 112 U. S. 580, *United States v. Grimaud*, 220 U. S. 506, and Twin City *National Bank v. Nebeker*, 167 U. S. 196. It is so clear as to need no argument that the present assessment at issue is not designed, calculated or in fact such a regulatory measure. Its purpose as specifically set forth (FDO 79, Sec-

tion 4) is "to meet the expenses which the Director finds will be necessarily incurred by the operations of this order." It is thus a necessary conclusion that this assessment is not a regulatory mode of the type under discussion, and that cases dealing with such type of regulations afford no precedent or support for its validity.

6. The type of assessment in issue is foreign to our normal and customary governmental procedures, and authority to impose such an assessment ought not to be lightly implied from a strained and indefinite congressional intent reposing wholly in silence.

Administrative assessments for operating expenses are contrary to our accepted and cherished governmental practices and precepts. Over the years, and based upon experience, there has been developed a Bureau of the Budget to scan appropriation requests and assure the careful and efficient use of public funds. If administrative agencies are to be permitted to finance themselves this safeguard is of no effect and can be evaded. The nature and extent of administrative execution of delegated congressional policy is subject to continued surveillance by Congress and can be reviewed and partially controlled through appropriation of public funds, as witness the debate and consideration in respect to the Office of Price Administration in the Spring of 1944. Such control is sacrificed and Congress may be ignored in this respect should assessments of the type here involved be permitted. An unfair and unreasonable burden of governmental expense would be placed by such assessments upon a limited class. It cannot be doubted that the benefits of such regulation as here involved inures primarily if not entirely to the benefit of the public. The cost of securing such benefit should be shared by the public through the use of public funds, and not be imposed upon a small class receiving little if any special benefit. With as much or more reason such cost of operation might be

imposed upon milk consumers rather than handlers. Such determinations are matters of substantial and basic policy and are appropriate only for congressional action, as contemplated by our Constitution. If chaos is to be avoided the over-all government financing problem should be considered as a whole—by Congress—and the public should not be subjected to unrelated, overlapping and confusing administrative assessments as would be bound to result were assessments of the type here involved permitted. This is a part of the over-all war program. Congress has procured by taxation and borrowing many billions of dollars and appropriated such sums to finance our gigantic war undertaking. It is hardly conceivable that it was intended that this agency was to be granted a special, added fund-raising power of its own. This assessment is contrary to our principle of government. It is the hole in the dike which must be plugged. This pernicious attempt at usurped power must be thwarted in order that it does not spread far afield and destroy our constitutional government. A decision so momentous should not be found through implication from congressional silence. Such finding of assessing power should be made only from the clearest of congressional pronouncements.

II. THE POWER TO EXACT THE ASSESSMENT IN ISSUE, IF IMPLIED, WOULD RESULT IN AN INVALID AND UNCONSTITUTIONAL DELEGATION OF LEGISLATVE AUTHORITY.

A. Determination of the method of financing the cost of governmental regulation is an exclusive power of Congress.

Statutes and judicial decisions are numerous on the question of financing the regulation of matters in which the public and the parties regulated are equally interested. In its opinion (R. 129), the Circuit Court of Appeals found the subject regulation to be one of such blended interest,

and that the law there applicable was that the "*imposition of costs on individuals or on the state or apportionment between them is a matter of congressional or legislative discretion.*" (Emphasis supplied.) We are wholly in accord with this view and are happy to adopt the Circuit Court's language. We believe that such view is determinative of the issue in question and conclusive of the invalidity of the assessment provision contested. Such determination of policy as to the method of providing for the expenses of regulation is fundamental and reposes exclusively in the legislative branch of the government. If not an integral part of the taxing power and authority, it is so closely allied and related as to be separated only by highly artificial technicality. Such matter of basic legislative policy and discretion is a power which cannot be delegated by Congress. Clearly, Congress and no other governmental branch or agency is bound to determine the policy as to mode of financing governmental operations. To attempt to do otherwise is to directly violate the constitutional provisions relative to legislative responsibility and separation of powers. It is equally clear that the Second War Powers Act does not exercise this discretion and does not provide any determination of such basic policy. It is apparent that in the absence of the assessment provisions contested the expenses of carrying into effect FDO 79 and 79-3 would be wholly borne by the government or public. The effect of the assessment provisions—determined upon and promulgated by the War Food Administrator and not by Congress —if valid, would be to impose such expense on the individuals regulated, or at the least would result in an apportionment of the expenses. Thus, it is obvious that the determination of whether to have or not to have such an assessment is in fact and in effect a determination of the discretion and policy as to the imposition of the costs of regulation. That, as the lower court aptly pointed out, is a matter for congressional determination. The War Food

Administrator by an attempted usurpation of such legislative authority purported to require by assessment the imposition of the costs of regulation upon petitioners and other milk handlers. As a consequence, we submit that such assessment provisions are contrary to Article I, Section 1 of the Constitution of the United States and accordingly invalid.

Even were it considered that Congress had authorized by implication the imposition of an assessment upon milk handlers such attempted delegation of authority would be fatally defective. In the first place, such authority would result in transferring to the War Food Administrator legislative discretion since it cannot be contended that the Second War Powers Act makes such an assessment mandatory. The very act of making the assessment requirement is the exercise of legislative discretion as to the policy of financing.

B. The claimed power is invalid because of indefiniteness and the lack of any standard, limitation or guidance for administrative application.

A delegation of power such as is claimed by respondents, which is without standards, limitations, bounds or policy or guidance in execution is invalid as a delegation of exclusive legislative function rather than of administrative detail in putting legislative policy into operation.

> "A statute which in effect reposes an absolute, unregulated, and undefined discretion in an administrative body bestows arbitrary powers and is an unlawful delegation of legislative powers. The presumption that an officer will not act arbitrarily but will exercise sound judgment and good faith cannot sustain a delegation of unregulated discretion." 42 *Am. Jur.* 343, Sec. 45. See *Schechter v. U. S.*, 295 U. S. 495, 79 L. ed. 1570; *Panama Ref. Co. v. Ryan,* 293 U. S. 388, 79 L. ed. 446; *J. W. Hampton & Co. v. U. S.*, 276 U. S. 394, 72 L. ed. 624; *Yick Wo v. Hopkins,* 118 U. S. 356; 30 L. ed. 220.

The Second War Powers Act does not provide a single guide or standard as to the imposition of any assessments. There is no requirement of reasonableness either in respect to assessment or expense. In the assessment provision of FDO 79, the *War Food Administrator* sets a limit of three cents per hundred weight of milk handled, but a charge of thirty cents or three dollars or even more may be made tomorrow if the Administrator himself so chooses. It is no answer to say the present assessment is reasonable (if such were true). The fact remains that the power claimed is unlimited and if the power claimed should exist at all, there is in fact, no limitation on it in the Second War Powers Act and here certainly would be an unconfined and vagrant delegation of legislative authority.

> "Although there is no standard, definite or even approximate, to which legislation must conform, 'it is not validly enacted where it produces a delegation of legislative authority which is unconfined, vagrant and not canalized within banks to keep it from overflowing'." 11 *Am. Jur.* 957, Sec. 240. See, *Schechter v. U. S.*, 295 U. S. 495; 79 L. ed. 1570; 55 S. Ct. 837; 97 A. L. R. 947; *Panama Ref. Co. v. Ryan*, 293 U. S. 388, 79 L. ed. 446, 55 S. Ct. 241; *Portland v. Welch*, 154 Or. 286, 59 P. (2) 228, 106 A. L. R. 1188.

It is noted that the Circuit Court referred in its opinion (R. 129) to the limiting of assessments to expenses, but this too is a limitation imposed by the regulation itself and not by Congress. Such limitation by the regulation cannot validate a delegation of power otherwise invalid for indefiniteness and lack of declared policy. See 42 *Am. Jur.* 343, Sec. 45, *supra.*

C. The assessment in issue is a revenue-raising tax, and Congress may not delegate the power to determine the imposition thereof.

Certain fundamentals of our constitutional form of government which have never been seriously questioned are

directly violated and attempted to be nullified by the assessment provision of FDO 79 challenged by petitioners. Article I of the United States Constitution has long been understood to vest and establish beyond argument the legislative powers of the federal government exclusively in the Congress (Section 1), and specifically vesting in Congress the power to levy and collect taxes. (Section 8)

> "* * * it is universally recognized that in distribution of the powers of government in this country into three departments, namely, legislative, executive, and judicial, the power of taxation is peculiarly and exclusively legislative and consequently falls to the legislature." 51 *Am. Jur.* 71, Sec. 42 and cases cited.

In the assessment provisions of FDO 79 respondents would usurp unto the War Food Administrator the legislative power of Congress exclusively to lay and collect taxes.

It is clear that the assessment provision objected to is a tax pure and simple, designed solely for the purpose of raising revenue to pay expenses of governmental operation. The multitude of judicial decisions defining a tax are perhaps best condensed and summarized as follows in 51 *Am. Jur.* 35, Sec. 3:

> "A tax is a forced burden, charge, exaction, imposition, or contribution assessed in accordance with some reasonable rule of apportionment by authority of a sovereign state upon the persons or property within its jurisdiction, to provide public revenue for the support of the government, the administration of the law, or the payment of public expenses."

Food Distribution Order 79 (R. 7-10) provides in part as follows:

> "Section (c) (2) (vi). Collect the assessments as provided in this order from handlers required to pay such assessments;
>
> "Section (c) (2) (xii). Pay out of the funds collected by him as market agent the cost of his bond and of the bonds of his employees, his own compensation

and that of his employees, and all other expenses necessarily incurred by him in the performance of his duties hereunder;

"Section (c) (4). Each handler shall pay the market agent, within 20 days after the close of each calendar month, after the date of appointment of the market agent, an assessment upon the milk, milk byproducts, and cream, or any such portion thereof as may be specified by the Director, delivered by such handler during each such calendar month. This assessment shall be fixed, and may be modified from time to time, by the Director *to meet the expenses which the Director finds will be necessarily incurred by the operations of this order* in connection with an order issued pursuant hereto by the Director: Provided, however, That the assessment shall not exceed $0.03 per hundredweight of milk, milk equivalent of cream, and skim milk equivalent of milk byproducts." (Emphasis supplied.)

It is thus abundantly clear from the express provisions of the Order pointed out above, and which are contested in this action, that the only purpose of such assessments is to finance the administrative agency and thereby largely place such agency beyond Congressional control and direction. Were such procedure to be sanctioned the exclusive power of Congress to tax would be a thing of the past and our Constitutional foundations undermined and direct governmental responsibility to the public seriously weakened. The attempted usurpation of taxing power here contested represents the most flagrant, deliberate and uncamouflaged attack upon our cherished rights protected by our Constitution that has come to our attention.

This type of revenue-raising charge to which we vehemently object is to be carefully distinguished from the totally different charges which Congress has authorized administrative agencies to make as a regulatory method in connection with permissible control over interstate commerce, immigration, public lands and like subjects. In such cases the charge is one of the means of regulation, which is the

primary purpose, and revenue resulting therefrom is merely incidental. Even in such cases the Congressional intent has been carefully inquired into. See the *Head Money Cases* and *United States v. Grimaud* hereinbefore discussed. In the instant case there is no attempt to disguise the assessment as a regulatory means, and it is clear that it is not. This is a clear violation of every Constitutional provision and safeguard pertaining to the taxing power. We know of no case even suggesting the validity of such type of assessment, and counsel for respondents have suggested none. We submit that Congress has no Constitutional authority or power to delegate to or clothe any administrative agency with the right to levy this type of assessment, although we do not feel any need to argue such point, since it seems abundantly clear that Congress had no such intent and made no such delegation as claimed by respondents.

CONCLUSION.

We thus conclude that the assessment provisions of FDO 79 and 79-3 are invalid, because the Second War Powers Act does not delegate to the War Food Administrator authority to levy such an assessment and because the power to exact such an assessment, if implied, would be an invalid and unconstitutional delegation of legislative authority.

It is respectfully submitted, that in view of the gravity and importance of the question involved in this case, the fact that the question involved has not been passed upon by the Supreme Court of the United States and the great public interest in having the Supreme Court decide this question, it is clearly a case that requires review and decision by this Court.

Respectfully submitted,

WALTER AND HAVERFIELD,

By PAUL W. WALTER,

Counsel for Petitioners.

INDEX

CITATIONS

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1296

WILLIAM A. WAREHIME, D. B. A. NEZEN MILK FOOD COMPANY, ET AL., PETITIONERS

v.

H. H. VARNEY, MILK MARKET AGENT, WAR FOOD ADMINISTRATION, AND FRED W. ISSLER, MARKET AGENT, WAR FOOD ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 118–130) is reported at 147 F. 2d 238. The findings of fact and conclusions of law of the district court appear at pages 105–111 of the record. The opinion of the district court on respondents' motion to quash service (R. 14–15) and the court's supplemental opinion on the motion for injunction, which is not included in the record, are reported at 54 F. Supp. 907.

JURISDICTION

The judgment of the circuit court of appeals was entered February 8, 1945 (R. 117). A petition for rehearing was denied March 19, 1945 (R. 130). The

petition for a writ of certiorari was filed May 21, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1945.

QUESTIONS PRESENTED

1. Whether a public announcement of sanctions applicable to violators of a food distribution order promulgated by the War Food Administrator constituted a sufficient threat of irreparable damage to justify the issuance of an injunction against local administrators, who had no power to enforce such sanctions, restraining them from collecting assessments due under the order.

2. Whether an assessment against handlers of milk to pay the costs of local administration of a milk allocation order, in accordance with customary practice in the regulation of the milk industry, constitutes an appropriate exercise of the power delegated by the Second War Powers Act to make rules and regulations for the allocation of scarce materials under such conditions as may be deemed necessary and appropriate.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Second War Powers Act and of the food distribution orders promulgated thereunder appear in the Appendix, *infra*, pp. 13–16.

STATEMENT

Proceeding under the authority vested in him by the President pursuant to the Second War Powers Act, *infra*, p. 13, the War Food Administrator, on September 7, 1943, issued Food Distribution Order

No. 79 (8 F. R. 12426) establishing a system for allocating milk among handlers of that product. The order authorized the Director of Food Distribution of the War Food Administration to designate milk sales areas, and within such areas to establish quotas among handlers for the sale of milk and milk by-products; to appoint in each area or combination of areas a market agent who would obtain and assemble reports from handlers of milk, receive petitions for relief from hardship and transmit such petitions to the Director with his recommendation, keep books and records, audit and inspect books and inventories of handlers of milk, and investigate and report violations to the Director. The order further provided that the handlers should pay to the market agent an assessment to be fixed by the Director of Food Distribution at a rate not to exceed three cents per hundredweight of milk, such funds to be used to meet expenses incurred in the administration of the sales-area order. The market agent was authorized to collect the assessment and to use the funds thus received for his necessary expenses. The order contained a provision that, in the event of violation, the War Food Administrator was empowered to suspend, revoke or reduce the quota allotted to the violator; to prohibit such person from receiving or using milk or any other material subject to control by the War Food Administrator; and to recommend that such person be prevented from receiving any materials subject to priority or allocation by other government agencies. It also stated that a wilful violation of the order constituted a crime punishable

under applicable laws.[1] On October 4, 1943, this order was extended to the Cleveland, Ohio, area by Food Distribution Order No. 79–3 (8 F. R. 13367), which fixed quotas for handlers for sales of milk in the civilian market and provided for an assessment upon the handlers of one cent per hundredweight on quota milk.

On January 10, 1944, petitioners, 27 persons engaged in the business of distributing milk and milk byproducts in the Cleveland area, filed a complaint and a motion for preliminary injunction in the United States District Court for the Northern District of Ohio against respondents Issler and Varney, market agent and deputy agent, respectively, for the Cleveland area, and Marvin Jones, War Food Administrator, seeking to enjoin them from enforcing Food Distribution Orders Nos. 79 and 79–3 on the ground that the assessment provisions of the orders were unauthorized (R. 2–6). The defendants appeared specially and moved to quash service and to dismiss the complaint and the motion for preliminary injunction (R. 13). The court quashed service as to the War Food Administrator, but otherwise overruled the motion (R. 15–16). Respondents then filed an answer in which they alleged *inter alia* that the complaint failed to show such threatened injury to petitioners as would confer equitable jurisdiction upon the court (R. 16–19). A hearing was had on the motion for preliminary injunction which was, by agreement, considered as on final hearing (R. 22).

[1] The full text of Food Distributon Order No. 79 appears at pp. 7–9 of the record.

On May 27, 1944, the court entered findings of fact and conclusions of law (R. 105–111). It found that on October 6, 1943, respondent Issler called a meeting of milk dealers in Cleveland and explained the purpose and operation of Food Distribution Order No. 79; that he read the order to them, including the provisions in respect of sanctions for violations; that in response to a question from the floor, he advised the dealers that rationed products could be withheld from violators of the order and used the word "jail";[2] that a report of Issler's statements respecting sanctions was published in the Cleveland Plain Dealer. The court also found that respondents had sent letters to petitioners requesting that reports be filed and on one occasion requesting that the assessment be remitted, but that neither of the respondents nor anyone acting on their behalf had at any time addressed threats to petitioners personally. (R. 105–106.) It was further found that the Market Agent's enforcement powers "are limited to investigating and reporting to the Director of Food Distribution of violations of the Orders" (R. 105). The court concluded that respondent Issler's reading of the order and his reference to sanctions was "a sufficient showing of irreparable damage done or threatened to the plaintiffs by the defendants to afford the plaintiffs a basis for seeking injunctive relief" (R. 109), and held that the assessment provisions of Food Distri-

[2] Issler testified that he remarked that he "didn't think anybody would go to jail;" that he thought other sanctions would be used in enforcing the order (R. 30).

bution Order No. 79 were "outside of the powers delegated to the President under the Second War Powers Act" (R. 110). It accordingly entered an order permanently enjoining respondents, their agents, or anyone acting on their behalf, from enforcing the assessment provisions (R. 112).

On appeal, the Circuit Court of Appeals for the Sixth Circuit held that the cause was cognizable in equity but that the assessment provision was an authorized regulation (R. 118–130). It therefore reversed the order of the district court and remanded the cause with directions to dismiss the complaint (R. 117).

ARGUMENT

Although the court below held to the contrary, we submit that the facts found by the district court in themselves plainly demonstrate the absence of the requisites for the exercise of equity jurisdiction. This Court would accordingly not be called upon to decide the question presented by the petition for certiorari relating to the validity of the regulation requiring milk handlers to pay assessments.

Furthermore, on June 21, 1944, after the entry of judgment in the district court, the assessment provisions of the regulations were deleted by the Administrator (9 Fed. Reg. 6982) immediately prior to the passage of the 1945 Department of Agriculture Appropriation Act with a provision prohibiting the expenditure of funds in the execution of orders (save as to walnuts) which provided for assess-

ments.[3] Although this does not make the case moot insofar as it concerns assessments due before June 1944, it does greatly lessen its importance, inasmuch as since that time no order (except as specifically permitted for walnuts) has contained an assessment provision. The question as to the validity of the assessments has been raised in no other case.

1. Notwithstanding the holding of the courts below, we think that petitioners failed to establish facts conferring equity jurisdiction on the district court. The only "threat" which the district court found respondents to have made was the public announcement on October 6, 1943, of the sanction provisions of Food Distribution Order No. 79. In the three months that intervened between that time and the filing of the complaint, no threat was made to petitioners, even though they had failed to file reports required under other provisions of the order, the validity of which is not challenged.[4] Moreover, respondents were without power to impose any sanc-

[3] The Act was approved by the President June 28, 1944. Pub. Law 367, 78th Cong., 2d sess., c. 296, p. 25. The paragraph appropriating for the War Food Administration contains a proviso "that none of the funds herein appropriated shall be used for the promulgation or execution of orders under which assessments are made against producers or handlers of agricultural products, excepting walnuts, for administration of such orders." An identical proviso was contained in the Appropriation Act for the fiscal year ending June 30, 1946. Pub. Law 52, 79th Cong., 1st sess., c. 109, p. 20.

[4] At the district court's direction after a pretrial conference, such reports were filed on the first day of the hearing (R. 49, 106).

tions themselves; they could merely report violations to the Director of Food Distribution (R. 29, 30, 35, 105. See Appendix, *infra*, p. 14).

The War Food Administrator and the Director of Food Distribution, over whom the district court concededly had no jurisdiction, had power under the order only to suspend, reduce or revoke quotas or to prohibit the receipt or use of rationed products subject to their control. Before exercising such power, however, they were required to give notice and hold a hearing (Procedural Regulation No. 1, 8 F. R. 16497), and any order suspending an allocation would be subject to judicial review. Pub. Law 509, 78th Cong., 2d Sess., c. 614. There was no proof and no finding that any such proceeding had been instituted or threatened. Also, the War Food Administrator could merely recommend that violators of the order be prohibited from receiving materials subject to priority and allocation by other government agencies (Food Distribution Order No. 79, paragraph (h), *infra*).[5] In any event, it is not the policy of the Administrator to seek to collect assessments through the suspension of quotas or allocations, and no proceedings for this purpose have ever been instituted against anyone.

Even the War Food Administrator is without power to impose the penal sanctions on which the district court based its conclusion that petitioners had been threatened with irreparable damage. The criminal penalties of the Second War Powers Act can be enforced only by the Attorney General or the

[5] This provision was deleted on August 16, 1944 (9 F. R. 10035).

United States Attorney (R. 78–80); it does not appear that they have made any threats, and they are not parties to this suit. Civil actions to collect the unpaid assessments would also have to be brought by these officials of the Department of Justice. The possibility of such civil judicial proceedings in which the validity of the assessments could be contested would not show that the remedy at law was inadequate but the contrary.

Under these circumstances, on the district court's own findings of fact, there was no such showing of clear and immediate injury or threat of irreparable damage as would justify the invocation of the equity powers of the district court. *California* v. *Latimer*, 305 U. S. 255, 261; *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160, 173–174; *Yarnell* v. *Hillsborough Power Co.*, 70 F. 2d 435 (C. C. A. 5). The decision of this Court in *Columbia System* v. *United States*, 316 U. S. 407, 417–418, which the circuit court of appeals considered as upholding the equity jurisdiction of the district court (R. 125), is readily distinguishable, for there the complaint alleged that the mere pronouncement of the challenged regulation had an immediate adverse effect on the plaintiffs' contractual relations with third parties. Here the challenged regulation merely fixed a small assessment and could have no effect on plaintiffs' business until some steps were taken for its collection.[6] Until petitioners could show that the assessment was to be enforced by a method which would deprive them of an effective remedy for determining

[6] One of the petitioners testified that the assessment against him amounted to about $50 per month (R. 65).

its validity, they could not establish threatened irreparable injury.

2. On the merits, we think that the decision of the circuit court of appeals is correct in holding that the assessment provision represents an appropriate exercise of the power conferred on the President to allocate scarce materials "upon such conditions * * * as he shall deem necessary and appropriate in the public interest and to promote the national defense." It has been held in some circumstances that a congressional grant of power to an administrator to make rules and regulations to effectuate a statute includes the power to fix fees as an incident to such regulation. *Hamilton* v. *Dillin*, 21 Wall. 73, 93; *United States* v. *Grimaud*, 220 U. S. 506, 522. We submit that special considerations affecting the milk industry demonstrate that the assessment here involved is an appropriate means of exercising the power to allocate. Due to many factors, including the perishable nature of milk, its importance as a food, the variations in the size and character of organizations for its distribution, and the prevalence of local regulations governing its production and sale, a high degree of decentralization in a regulatory program is imperative. Specialized local supervision is therefore a characteristic of regulation in the milk industry and statutes providing for such regulation have customarily included provisions whereby the cost of such local supervision is borne by the industry itself. Thus, Section 10 (b) (2) of the Agricultural Adjustment Act, as reenacted by the Agricultural Marketing Agreement Act of June 3, 1937 (50 Stat.

246) (7 U. S. C. 610 (b) (2)), provides that a handler subject to a marketing order under that Act shall pay a pro rata share of the expenses found to be necessarily incurred in the maintenance of the agencies established by the Act. A number of state laws regulating the sale of milk also provide for payment of fees by the industry to administrative agencies for administrative expenses.[7] The same type of local supervision is necessary for the effective administration of Food Distribution Order No. 79. Under that order 144 supplemental orders establishing milk sales areas have been promulgated and such orders are in effect in 40 states and the District of Columbia.[8] In the light of these circumstances it was appropriate for the War Food Administrator, in exercising the authority delegated in the Second War Powers Act to allocate scarce materials, to utilize the method which was customary in the milk industry and which had been found by both federal and state legislators to be peculiarly adapted to the regulation of milk.

As has been pointed out, in the 1945 Department of Agriculture Appropriation Act (Pub. Law

[7] California Agricultural Code (Deering), Sec. 736.3; Connecticut Gen. Stat. (1941 Supp.), Sec. 338f; Florida Stat. Ann. (1941), Sec. 501.09; Maine Laws of 1935, c. 13, Sec. 7; Massachusetts Acts of 1941, c. 691, Sec. 9 (a); New York Agriculture and Markets Law (McKinney, 1944 Supp.), Sec. 258–m; Rhode Island General Laws, 1938, c. 215, Sec. 6; Virginia Code (1942), Sec. 1211gg.

[8] These figures were supplied by the office of the War Food Administrator. The supplemental orders, all of which are similar to Food Distribution Order No 79–3 (see p. 4, *supra*), are published in the Federal Register.

367, 78th Cong., 2d sess., c. 296), Congress inserted a proviso that none of the funds appropriated to the War Food Administrator "shall be used for the promulgation or execution of orders under which assessments are made against producers or handlers of agricultural products, excepting walnuts, for administration of such orders." By allowing the assessment to be continued against shippers of walnuts,[9] Congress indicated that it did not consider that the various assessment provisions then in effect were beyond the powers delegated in the Second War Powers Act. The proviso represented merely a congressional determination to meet the expenses of local administration in a different fashion, and Congress accordingly appropriated an additional $1,100,000 for such purpose (see S. Rep. No. 886, 78th Cong., 2d sess., p. 7; H. Rep. No. 1605, 78th Cong., 2d sess., p. 6).

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

HUGH B. COX,
Acting Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
ROBERT S. ERDAHL,
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Attorneys.

JUNE 1945.

[9] The order allocating walnuts produced on the West Coast and providing for an assessment against shippers had been issued on September 28, 1943, prior to the passage of this Act (8 F. R. 13283).

APPENDIX

The Act of June 28, 1940, 54 Stat. 676, as amended by the Act of May 31, 1941, 55 Stat. 236, and by Title III of the Second War Powers Act, 1942, 56 Stat. 176 (50 U. S. C. App., Supp. III, 633), provides in part:

> SEC. 2 (a) (2): * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.
>
> * * * * *
>
> SEC. 2 (a) (5): Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.
>
> * * * * *
>
> SEC. 2 (a) (8): The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe.

By a series of Executive Orders (9280 (7 F. R. 0179), 9322 (8 F. R. 3807), 9334 (8 F. R. 5423)) the President authorized the War Food Administrator

to exercise the President's powers under this Act in respect to food, and further authorized the Administrator to delegate any part of such powers to employees of the Department of Agriculture. Food Distribution Order No. 79 (8 F. R. 12426), promulgated by the Administrator on September 7, 1943, established a system of regulation for handlers of milk. The pertinent provisions of this order are as follows:

* * * * *

(c) *Administration.*—(1) The Director [of Food Distribution] shall designate a market agent for each milk sales area or for a combination of several such areas and shall fix the amount of his salary. Insofar as he performs functions for the United States, the market agent will act under his appointment as collaborator without compensation from the United States. The market agent shall be subject to removal by the Director at any time, and all his acts shall be subject to the continuing right of the Director to disapprove at any time. Upon such disapproval, his acts shall be deemed null and void except insofar as any other person has acted in reliance thereon or in compliance therewith prior to such disapproval.

(2) The market agent is authorized and directed to:

* * * * *

(x) Investigate and report to the Director any violation of this order;

* * * * *

(xii) Pay out of the funds collected by him as market agent the cost of his bond and of the bonds of his employees, his own compensation and that of his employees, and all other expenses necessarily incurred by him in the performance of his duties hereunder;

* * * * *

(4) Each handler shall pay the market agent, within 20 days after the close of each calendar month, after the date of appointment of the market agent, an assessment upon the milk, milk byproducts, and cream, or any such portion thereof as may be specified by the Director, delivered by such handler during each such calendar month. This assessment shall be fixed, and may be modified from time to time, by the Director to meet the expenses which the Director finds will be necessarily incurred by the operations of this order in connection with an order issued pursuant hereto by the Director: *Provided, however,* That the assessment shall not exceed $0.03 per hundredweight of milk, milk equivalent of cream, and skim milk equivalent of milk byproducts.

* * * * *

(h) *Violations.*—The War Food Administrator may suspend, revoke, or reduce the quota of any person who violates any provision of this order, may prohibit by order such person from receiving, or using milk, cream, or any other material subject to priority or allocation control by the War Food Administrator, and may recommend that any such person be prohibited from receiving, making any deliveries of, or using materials subject to the priority or allocation control of other governmental agencies. In addition, any person who wilfully violates any provision of this order is guilty of a crime and may be prosecuted under any and all applicable laws. Further, civil action may be instituted to enforce any liability or duty created by, or to enjoin any violation of, any provision of this order.

* * * * *

On October 4, 1943, this order was extended to the Cleveland area by Food Distribution Order 79–3

(8 F. R. 13367), the pertinent provisions of which are as follows:

(n) *Expense of administration.*—Each handler shall pay to the market agent, within 20 days after the close of each calendar month an assessment of $0.01 per hundredweight of each of milk, cream, skim milk, buttermilk, flavored milk drinks, beverages containing more than 85 percent of skim milk, and skim milk equivalent of cottage, pot, or baker's cheese delivered during the preceding quota period and subject to quota regulations under the provisions hereof.

(o) *Violations.*—The market agent shall report all violations to the Director together with the information required for the prosecution of such violations, except in a case where a handler has made deliveries in a quota period in excess of a quota in an amount not to exceed 5 percent of such quota, and in the succeeding quota period makes deliveries below that quota by at least the same percent.

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